

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Pamela O'Shaughnessy, )  
Plaintiff, ) No. CV-06-0207-MWL  
v. ) ) ORDER GRANTING DEFENDANT'S  
MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
of Social Security,<sup>1</sup> )  
Defendant. )  
)

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument on February 5, 2007. (Ct. Rec. 10, 12). Attorney Clifford King B'Hymer represents Plaintiff; Special Assistant United States Attorney L. Jamala Edwards represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 12).

<sup>1</sup>As of February 12, 2007, Michael J. Astrue succeeded Commissioner Linda S. McMahon as acting Commissioner of Social Security. Pursuant to FED. R. CIV. P. 25(d)(1), Commissioner Michael J. Astrue should be substituted as Defendant, and this lawsuit proceeds without further action by the parties. 42 U.S.C. § 405(q).

1 and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 10).

2 **JURISDICTION**

3 On February 13, 2006, Administrative Law Judge ("ALJ") R.J.  
 4 Payne issued a decision finding the plaintiff was not under a  
 5 disability as defined in the Social Security Act at any time  
 6 relevant to this matter. (Administrative Record, "AR," 13-21).

7 Plaintiff filed an application for Disability Insurance  
 8 Benefits ("DIB") (AR 55-57) alleging degenerative joint disease in  
 9 her right knee, back pain, and depression.<sup>2</sup> (AR 69). The  
 10 application was denied initially and on reconsideration.

11 On September 28, 2006, plaintiff appeared for a hearing  
 12 before ALJ R.J. Payne. At the hearing testimony was taken from  
 13 the plaintiff and medical expert George Weilepp, M.D. (AR 236-  
 14 296). On February 13, 2006, the ALJ issued a decision finding  
 15 that plaintiff was not disabled. (AR 13-21). The Appeals Council  
 16 denied a request for review (AR 5-8). Therefore, the ALJ's  
 17 decision became the final decision of the Commissioner, which is  
 18 appealable to the district court pursuant to 42 U.S.C. § 405(g).  
 19 Plaintiff filed this action for judicial review pursuant to 42  
 20 U.S.C. § 405(g) on July 20, 2006. (Ct. Rec. 1).

21 **STATEMENT OF FACTS**

22 The facts have been presented in the administrative hearing  
 23 transcript, the ALJ's decision, the briefs of both Plaintiff and  
 24 the Commissioner and will only be summarized here. Plaintiff was  
 25 48 years old on the date of the ALJ's decision. (AR 14, 261).

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 27 <sup>2</sup>The ALJ points out that Plaintiff filed a previous DIB application in  
 28 2001. The application was denied initially and on reconsideration. Plaintiff  
 requested a hearing but withdrew her request. ALJ Paul L. Gaughen issued  
 an order dismissing the hearing request on July 11, 2003. ALJ Payne did not  
 reopen the prior application. (AR 13).

1 She has a high school education. (AR 14, 75). Plaintiff's past  
2 relevant work consists of working as an environmental technician  
3 at a paper mill and as a bartender. (AR 14, 70). She has not  
4 performed substantial work since October 4, 2002. (AR 69, 280).

5 At the administrative hearing held on September 28, 2005,  
6 plaintiff testified that she did not live alone but was sharing  
7 houses with her boyfriend. (AR 279). She is 5'9" tall and weighs  
8 from 262 to 272 pounds, but weighed 180 pounds before she retired  
9 from her job at the paper mill. (AR 261, 245). Plaintiff cannot  
10 work because her right knee is constantly painful and the pain  
11 worsens with activity. (AR 262, 282).

12 Plaintiff is able to walk about 2 blocks before she must stop  
13 to rest. (AR 262). She can stand for 30 minutes and sit for an  
14 hour. (AR 264, 267). Plaintiff's daily activities include  
15 showering, sometimes cooking meals, washing dishes, watching  
16 television and doing laundry. (AR 289). Occasionally she and her  
17 boyfriend go for a drive. (AR 291). Plaintiff has a driver's  
18 license with no restrictions on it and drives from Clarkston to  
19 Spokane three times a year to visit family. (AR 281). She has to  
20 lie down 40 to 50% of the day due to knee pain; she takes Aleve  
21 for her pain. (AR 268-269, 265).

22 Medical expert George Weilepp, M.D., testified at the  
23 administrative hearing held on September 28, 2005. (AR 239-260).  
24 Dr. Weilepp stated that plaintiff sustained an injury to her right  
25 knee and eventually underwent repair in June of 2000. (AR 242).  
26 He pointed out that when Dr. Kaltenbaugh opined that Plaintiff  
27 could not be functional at her job, she was working part-time. (AR  
28

1 243). Dr. Weilepp noted an assessed GAF of 65<sup>3</sup>. (AR 244). He  
2 opined that plaintiff's chronic pain created a mild to moderate  
3 impairment, her depression was greatly improved with medication,  
4 and her obesity was a moderate problem. (AR 243-244, 250-251,  
5 253). Dr. Weilepp opined that plaintiff's impairments would not  
6 meet or equal any of the listings of impairment, and Plaintiff's  
7 counsel stipulated that no listings were met. (AR 245, 295).

8 Dr. Weilepp opined that plaintiff's exertional limitations  
9 included: (1) lifting 20 pounds occasionally and 10 pounds  
10 frequently; (2) standing and walking 60 minutes at a time for a  
11 total of 3 to 4 hours a day; (3) sitting for 6 out of 8 hours a  
12 day; (4) kneeling, crouching, or stooping no more than  
13 occasionally; (5) climbing ramps or stairs no more than  
14 occasionally, and (6) not driving industrial vehicles. (AR 246-  
15 248). Plaintiff has no limitations of pushing and pulling, no  
16 limitations of handling, feeling and fingering, and no visual or  
17 communication limitations. (AR 246-247). Dr. Weilepp opined that  
18 Plaintiff can balance frequently and ordinary driving is within  
19 her RCF. (AR 247-248).

20 The ALJ found that the plaintiff could not perform her past  
21 relevant work. (AR 19). At step five, the ALJ found that  
22 plaintiff could perform other work that exists in significant  
23 numbers in the regional and national economy and is not disabled.  
24 (AR 19-20).

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27 28 <sup>3</sup>A Global Assessment of Functioning of 65 indicates some mild symptoms  
or some difficulty in social, occupational, or school functioning, but  
generally functioning pretty well. Diagnostic AND STATISTICAL MANUAL OF  
MENTAL DISORDERS, 4<sup>th</sup> Ed., (DSM-IV), at 32.

## **SEQUENTIAL EVALUATION PROCESS**

2       The Social Security Act (the "Act") defines "disability" as  
3 the "inability to engage in any substantial gainful activity by  
4 reason of any medically determinable physical or mental impairment  
5 which can be expected to result in death or which has lasted or  
6 can be expected to last for a continuous period of not less than  
7 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
8 Act also provides that a Plaintiff shall be determined to be under  
9 a disability only if any impairments are of such severity that a  
10 Plaintiff is not only unable to do previous work but cannot,  
11 considering Plaintiff's age, education and work experiences,  
12 engage in any other substantial gainful work which exists in the  
13 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
14 Thus, the definition of disability consists of both medical and  
15 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
16 (9<sup>th</sup> Cir. 2001).

17 The Commissioner has established a five-step sequential  
18 evaluation process for determining whether a person is disabled.  
19 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
20 is engaged in substantial gainful activities. If so, benefits are  
21 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
22 not, the decision maker proceeds to step two, which determines  
23 whether Plaintiff has a medically severe impairment or combination  
24 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
25 416.920(a)(4)(ii).

26 If Plaintiff does not have a severe impairment or combination  
27 of impairments, the disability claim is denied. If the impairment  
28 is severe, the evaluation proceeds to the third step, which

1 compares Plaintiff's impairment with a number of listed  
2 impairments acknowledged by the Commissioner to be so severe as to  
3 preclude substantial gainful activity. 20 C.F.R. §§  
4 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
5 App. 1. If the impairment meets or equals one of the listed  
6 impairments, Plaintiff is conclusively presumed to be disabled.  
7 If the impairment is not one conclusively presumed to be  
8 disabling, the evaluation proceeds to the fourth step, which  
9 determines whether the impairment prevents Plaintiff from  
10 performing work which was performed in the past. If a Plaintiff  
11 is able to perform previous work, that Plaintiff is deemed not  
12 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
13 At this step, Plaintiff's residual functional capacity ("RFC")  
14 assessment is considered. If Plaintiff cannot perform this work,  
15 the fifth and final step in the process determines whether  
16 Plaintiff is able to perform other work in the national economy in  
17 view of Plaintiff's residual functional capacity, age, education  
18 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
19 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

20 The initial burden of proof rests upon Plaintiff to establish  
21 a *prima facie* case of entitlement to disability benefits.  
22 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
23 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
24 met once Plaintiff establishes that a physical or mental  
25 impairment prevents the performance of previous work. The burden  
26 then shifts, at step five, to the Commissioner to show that (1)  
27 Plaintiff can perform other substantial gainful activity and (2) a  
28 "significant number of jobs exist in the national economy" which

1 Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
 2 Cir. 1984).

3 **STANDARD OF REVIEW**

4 Congress has provided a limited scope of judicial review of a  
 5 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
 6 the Commissioner's decision, made through an ALJ, when the  
 7 determination is not based on legal error and is supported by  
 8 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
 9 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
 10 "The [Commissioner's] determination that a plaintiff is not  
 11 disabled will be upheld if the findings of fact are supported by  
 12 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
 13 Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is  
 14 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
 15 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
 16 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
 17 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
 18 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
 19 evidence as a reasonable mind might accept as adequate to support  
 20 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
 21 (citations omitted). "[S]uch inferences and conclusions as the  
 22 [Commissioner] may reasonably draw from the evidence" will also be  
 23 upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On  
 24 review, the Court considers the record as a whole, not just the  
 25 evidence supporting the decision of the Commissioner. *Weetman v.*  
 26 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v.*  
 27 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

28 It is the role of the trier of fact, not this Court, to

1 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
2 evidence supports more than one rational interpretation, the Court  
3 may not substitute its judgment for that of the Commissioner.  
4 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
5 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial  
6 evidence will still be set aside if the proper legal standards  
7 were not applied in weighing the evidence and making the decision.  
8 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432,  
9 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to  
10 support the administrative findings, or if there is  
11 conflicting evidence that will support a finding of either  
12 disability or nondisability, the finding of the Commissioner is  
13 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
14 1987).

15 **ALJ'S FINDINGS**

16 The ALJ found at the onset that the plaintiff meets the  
17 nondisability requirements set forth in Section 216(i) of the  
18 Social Security Act and is insured for benefits through the date  
19 of his decision. (AR 14). The ALJ found at step one that  
20 plaintiff has not engaged in substantial gainful activity during  
21 any time at issue. (AR 15). At step two, the ALJ found that  
22 plaintiff's hypertension is not severe because it is controlled  
23 with medication. (AR 16). At step two the ALJ also found that  
24 plaintiff's depression is not a severe impairment, but she suffers  
25 from degenerative joint disease of the right knee, which is  
26 severe. (AR 15-16). At step three the ALJ found that this  
27 impairment does not meet or medically equal one of the Listings  
28 impairments. (AR 15).

1 At step four, the ALJ concluded that plaintiff has the  
2 residual functional capacity ("RFC") to perform a wide range of  
3 sedentary work. (AR 16). Plaintiff's RFC does not permit her to  
4 perform the exertional requirements of her past relevant work.  
5 (AR 19). The ALJ found that transferable skills are not at issue  
6 in this case. (AR 19). At step five, based on plaintiff's RFC,  
7 age, and education, the ALJ used the Medical-Vocational Guidelines  
8 and determined that there are a significant number of unskilled  
9 sedentary jobs in the national economy which she could perform  
10 despite her limitations. (AR 20). Accordingly, the ALJ determined  
11 at step five of the sequential evaluation process that plaintiff  
12 was not disabled within the meaning of the Social Security Act.  
13 (AR 20).

## ISSUES

15 Plaintiff contends that the Commissioner erred as a matter of  
16 law. Specifically, she argues that the ALJ erred by failing to  
17 properly credit the opinions of plaintiff's treating orthopedic  
18 specialist Orie Kaltenbaugh, M.D., and treating physician Donald  
19 Greggain, M.D. (Ct. Rec. 10-2, pp. 6-11).

20 This Court must uphold the Commissioner's determination that  
21 plaintiff is not disabled if the Commissioner applied the proper  
22 legal standards and there is substantial evidence in the record as  
23 a whole to support the decision.

## **DISCUSSION**

25 Plaintiff contends that the ALJ erred by failing to credit  
26 the opinion of orthopedist Orie Kaltenbaugh, M.D. (Ct. Rec. 10-2,  
27 pp. 8-9). The Commissioner responds that the ALJ properly  
28 evaluated the medical evidence and properly rejected some of the

1 limitations assessed by Dr. Kaltenbaugh. (Ct. Rec. 13, p. 7).

2 The courts distinguish among the opinions of three types of  
3 physicians: treating physicians, physicians who examine but do not  
4 treat the claimant (examining physicians) and those who neither  
5 examine nor treat the claimant (nonexamining physicians). *Lester*  
6 *v. Chater*, 81 F.3d 821, 839 (9<sup>th</sup> Cir. 1996). A treating  
7 physician's opinion is given special weight because of his  
8 familiarity with the claimant and his physical condition. *Fair v.*  
9 *Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir. 1989). Thus, more weight is  
10 given to a treating physician than an examining physician.  
11 *Lester*, 81 F.3d at 830. However, the treating physician's opinion  
12 is not "necessarily conclusive as to either a physical condition  
13 or the ultimate issue of disability." *Magallanes v. Bowen*, 881  
14 F.2d 7474, 751 (9<sup>th</sup> Cir. 1989) (citations omitted).

15 The Ninth Circuit has held that "[t]he opinion of a non-  
16 examining physician cannot by itself constitute substantial  
17 evidence that justifies the rejection of the opinion of either an  
18 examining physician or a treating physician." *Lester*, 81 F.3d at  
19 830. Rather, an ALJ's decision to reject the opinion of a  
20 treating or examining physician, may be based in part on the  
21 testimony of a non-examining medical advisor. *Magallanes*, 881  
22 F.2d at 751-55; *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9<sup>th</sup> Cir.  
23 1995). The ALJ must also have other evidence to support the  
24 decision such as laboratory test results, contrary reports from  
25 examining physicians, and testimony from the claimant that was  
26 inconsistent with the physician's opinion. *Magallanes*, 881 F.2d  
27 at 751-52; *Andrews*, 53 F.3d 1042-43. Moreover, an ALJ may reject  
28 the testimony of an examining, but non-treating physician, in

1 favor of a non-examining, non-treating physician only when he  
2 gives specific, legitimate reasons for doing so, and those reasons  
3 are supported by substantial record evidence. *Roberts v. Shalala*,  
4 66 F.3d 179, 184 (9<sup>th</sup> Cir. 1995).

5 Plaintiff saw Orie Kaltenbaugh, M.D., on January 11, 2000,<sup>4</sup>  
6 after falling at work and injuring her right knee on December 8,  
7 1999. (AR 138). An MRI showed changes consistent with a meniscus  
8 tear. (AR 139). On June 6, 2000, Dr. Kaltenbaugh performed  
9 arthroscopy with partial medial meniscectomy and debridement of  
10 the articular surface of the medial femoral condyle. (AR 120,  
11 139). A week later the sutures were removed. Dr. Kaltenbaugh  
12 told Plaintiff "to continue with activities as tolerated" and to  
13 follow up in a month. (AR 139). On July 7, 2000, Plaintiff  
14 reported that over the past two weeks she developed pain "along  
15 the medial border of the knee at the medial arthroscopy portal and  
16 slightly inferior to this" and but had no swelling. (AR 139). Dr.  
17 Kaltenbaugh noted that Plaintiff's pain seemed related to her  
18 activity level. He found some tenderness to palpitation along the  
19 anterior medial border of the tibia and the medial portal, and  
20 prescribed Vioxx. (AR 139).

21 Plaintiff followed up on August 29, 2000, reporting  
22 persistent pain at the medial border of the knee, and some  
23 grinding and popping but no swelling. (AR 139). On exam Dr.  
24 Kaltenbaugh noted full extension with 110 degrees of flexion, no  
25 significant crepitus with motion, no effusion, and some

27                 <sup>4</sup>The record reflects that Dr. Kaltenbaugh saw Plaintiff on October 29,  
28 1996, for followup after a rotator cuff decompression. He authorized Plaintiff  
to return to work as of January 6, 1997. (AR 138). These records predate  
Plaintiff's onset date of October 4, 2002.

1 tenderness to palpitation over the medial femoral condyle with the  
2 knee flexed to 90 degrees. (AR 139). Dr. Kaltenbaugh opined that  
3 the pain was likely due to articular surface changes seen during  
4 the arthroscopy. (AR 140). Plaintiff's symptoms were not relieved  
5 by physical therapy and anti-inflammatory medication. (AR 140).  
6 Plaintiff asked about another arthroscopy, but Dr. Kaltenbaugh did  
7 not believe that this would significantly change her symptoms. (AR  
8 140). Plaintiff did not feel capable of returning to work. Dr.  
9 Kaltenbaugh changed Plaintiff's prescription to Celebrex and  
10 noted, "I would like an IME performed." (AR 140). About a month  
11 later, on September 28, 2000, Plaintiff's symptoms were unchanged;  
12 she did not feel that medication significantly changed her  
13 symptoms. (AR 140). Dr. Kaltenbaugh had "no further treatment to  
14 offer at this time." (AR 140). He opined that weight loss would  
15 improve Plaintiff's knee pain. (AR 140). Dr. Kaltenbaugh advised  
16 Plaintiff to use anti-inflammatory medication as needed. He  
17 doubted that Plaintiff "will be able to return to work that  
18 requires repetitive use of stairs and ladders or entails prolonged  
19 walking," and he felt that restriction should be permanent. (AR  
20 140).

21 Plaintiff returned to Dr. Kaltenbaugh six months later, on  
22 March 26, 2001, complaining of worsening knee pain. (AR 140).  
23 Walking and standing at work were difficult; after a full day's  
24 work, at night Plaintiff had significant pain along the medial  
25 border of the knee, radiating along the medial tibia and medial  
26 distal thigh. (AR 140). She described slight swelling, episodes  
27 of her knee "giving way," and nearly falling on stairs several  
28 times; she was "trying to retire from Potlatch [a paper mill] this

1 summer." (AR 140). On exam, Dr. Kaltenbaugh noted tenderness to  
2 palpitation along the medial joint line and crepitation. (AR  
3 140). An x-ray showed decreased articular space but not bone on  
4 bone contact. (AR 140). Dr. Kaltenbaugh diagnosed degenerative  
5 arthritis, prescribed Lodine, and gave Plaintiff Capsaicin cream  
6 to use locally. He requested and obtained approval for Synvisc  
7 injections. (AR 140).

8 Plaintiff saw Dr. Kaltenbaugh 3 months later, on June 1,  
9 2001, for continuing knee pain. (AR 141). She felt unable to  
10 continue her work requirements, including climbing stairs daily.  
11 (AR 141). In addition to knee pain, Plaintiff had problems with  
12 her back. (AR 141). Dr. Kaltenbaugh does not treat back problems.  
13 (AR 141). He again opined that an IME should be performed to  
14 determine if Plaintiff could continue her present work and  
15 recommended an IME. (AR 141). Plaintiff stated that she did not  
16 want further treatment for her knee and did not want Synvisc  
17 injections. (AR 141). Dr. Kaltenbaugh suggested that she follow  
18 up as needed. (AR 141).

19 Plaintiff returned 8 months later, on March 1, 2002, for  
20 recurring knee pain. (AR 141). She used Advil intermittently and  
21 experienced pain when weight bearing. (AR 141). Plaintiff's pain  
22 was worse at night and interfered with sleep. (AR 141). Dr.  
23 Kaltenbaugh again prescribed Lodine. (AR 141). A month later  
24 Plaintiff returned complaining "of knee pain stating that she does  
25 relatively well, but cannot work due to her pain. She advised me  
26 that she is attempting to obtain SSI." (AR 141). Lodine was not  
27 improving Plaintiff's symptoms, so Dr. Kaltenbaugh gave her  
28 samples of Bextra. (AR 141).

1 Plaintiff returned 6 months later, on November 26, 2002, with  
2 knee pain that had not improved significantly. (AR 141). Anti-  
3 inflammatory medication provided partial relief. (AR 141).  
4 Plaintiff recently quit all of her work including working part-  
5 time bartending and bookkeeping. Her knee swells with activity  
6 and she felt that being off her knee helps "as much as anything."  
7 (AR 141). Dr. Kaltenbaugh opined that Plaintiff should continue  
8 "with activity modification and non-steroidal medication. She may  
9 also want to consider Synvisc injection." (AR 141). On the same  
10 date, Dr. Kaltenbaugh wrote a letter opining:

11 "[Plaintiff] is totally unable to work at this time, and I do  
12 not anticipate her condition improving over the foreseeable  
13 future. There are certain measures that might be effective,  
such as Synvisc injections or possibly a total knee  
replacement, but these are prohibitive right now due to  
financial considerations."

14 (AR 137).

15 Plaintiff returned more than a year later, on December 15,  
16 2003, for "deep aching" and swelling in her knee aggravated by  
17 walking and climbing stairs. (AR 142.) She had a recurring  
18 sensation of her knee giving way and catching, and fell on several  
19 occasions. (AR 142). On exam Dr. Kaltenbaugh observed that  
20 Plaintiff walks without a limp, her knee extends fully and will  
21 flex to 120 degrees. (AR 142). There was a small amount of  
22 effusion and some crepitus with motion, observed discomfort  
23 with medial joint line impingement as well as distraction,  
24 tenderness along the medial joint line, and no instability. (AR  
25 142). X-rays showed loss of articular space on weight bearing  
26 films and "what appears to be probable bone on bone contact." (AR  
27 142). Dr. Kaltenbaugh recommended that instead of using Naprosyn  
28 intermittently, Plaintiff should increase the dose and take it

1 twice daily consistently. (AR 142). He again opined that Synvisc  
2 injections were an option if Plaintiff could not function; her  
3 age and weight did not favor a total knee replacement. (AR 142).

4 The ALJ observed that Dr. Kaltenbaugh's November of 2002  
5 opinion that Plaintiff was "totally unable" to work is  
6 inconsistent with physical exams showing no crepitation, such as  
7 the exam performed by Christina Bjornstad, M.D., on December 17,  
8 2001. (AR 17, citing Exhibit B-2F at AR 121-122). Dr. Bjornstad  
9 found on exam that Plaintiff's lower extremities have normal  
10 muscle bulk; her gait was normal and balance good; with range of  
11 motion testing, she detected no creptitation in either knee. (AR  
12 121). Dr. Bjornstad opined that Plaintiff could work if she stood  
13 less than 2 hours a day, is able to sit indefinitely, should walk  
14 only on flat surfaces, and should not carry more than 5-10 pounds.  
15 (AR 122). The ALJ points out that Dr. Kaltenbaugh appears to base  
16 his opinion on Plaintiff's subjective reports of pain rather than  
17 on physical exam results and diagnostic studies such as those  
18 conducted by examining physician Dr. Bjornstad. (AR 17).

19 When weighing the medical testimony the ALJ considered  
20 Plaintiff's credibility, and found her less than completely  
21 credible. (AR 18-19). Credibility determinations bear on the  
22 evaluation of medical evidence when an ALJ is presented with  
23 conflicting medical opinions. *Webb v. Barnhart*, 433 F. 3d 683, 688  
24 (9<sup>th</sup> Cir. 2005).

25 The ALJ gave two reasons for finding Plaintiff less than  
26 completely credible: (1) her treatment history is inconsistent  
27 with the pain and functional limitations she described, in that  
28 Dr. Kaltenbaugh's progress notes refer to reported knee pain but

1 do not refer to objective findings on examination, and (2)  
2 Plaintiff's lack of compliance with treatment recommendations  
3 negatively affects her credibility. (AR 18). The ALJ observes  
4 that Plaintiff failed to lose weight until August of 2004, despite  
5 medical recommendations to lose weight to alleviate some of her  
6 knee pain. (AR 18). The ALJ notes that in June of 2001, Plaintiff  
7 told Dr. Kaltenbaugh that she did not want any further treatment  
8 for her knee, including the Synovisc injections he suggested. (AR  
9 18). The ALJ opined: "It would seem that if the claimant's knee  
10 pain were as severe as she has alleged, then she would want to try  
11 different treatment modalities, including weight loss and  
12 alternative medications in an effort to relieve her symptoms." (AR  
13 18).

14 As noted, when presented with conflicting medical opinions,  
15 the ALJ must determine credibility and resolve the conflict.  
16 *Matney v. Sullivan*, 981 F. 2d 1016, 1019 (9<sup>th</sup> Cir. 1992). It is the  
17 province of the ALJ to make credibility determinations. *Andrews*  
18 *v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir. 1995). However, the ALJ's  
19 findings must be supported by specific cogent reasons. *Rashad v.*  
20 *Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup> Cir. 1990). Once the claimant  
21 produces medical evidence of an underlying impairment, the ALJ may  
22 not discredit testimony as to the severity of an impairment  
23 because it is unsupported by medical evidence. *Reddick v. Chater*,  
24 157 F. 3d 715, 722 (9<sup>th</sup> Cir. 1998). Absent affirmative evidence of  
25 malingering, the ALJ's reasons for rejecting the claimant's  
26 testimony must be "clear and convincing." *Lester v. Chater*, 81 F.  
27 3d 821, 834 (9<sup>th</sup> Cir. 1995). "General findings are insufficient:  
28 rather the ALJ must identify what testimony is not credible and

1 what evidence undermines the claimant's complaints." *Lester*, 81 F.  
2 3d at 834; *Dodrill v. Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).  
3 The ALJ may consider at least the following factors when weighing  
4 the claimant's credibility: "[claimant's] reputation for  
5 truthfulness, inconsistencies either in [claimant's] testimony or  
6 between [her] testimony and her conduct, [claimant's] daily  
7 activities, [her] work record, and testimony from physicians and  
8 third parties concerning the nature, severity, and effect of the  
9 symptoms of which [claimant] complains." *Thomas v. Barnhart*, 278  
10 F. 3d 947, 958-959 (9<sup>th</sup> Cir. 2002), citing *Light v. Soc. Sec.*  
11 *Admin.*, 119 F. 3d 789, 792 (9<sup>th</sup> Cir. 1997).

12 The ALJ accepted Dr. Kaltenbaugh's diagnosis that Plaintiff  
13 suffers from degenerative joint disease in her right knee. (AR  
14 20). This medical evidence of an underlying impairment satisfies  
15 the first part of the *Reddick* test; the ALJ could not discredit  
16 testimony as to the severity of the impairment because it is  
17 unsupported by medical evidence. There is no affirmative evidence  
18 of malingering in this case; accordingly, the ALJ's reasons for  
19 rejecting Plaintiff's testimony must be "clear and convincing."

20 The ALJ found Plaintiff less than completely credible because  
21 the degree of impairment she alleged is not supported by the  
22 objective medical evidence of record. A lack of supporting  
23 objective medical evidence is a factor which may be considered in  
24 evaluating an individual's credibility, provided that it is not  
25 the sole factor. *Bunnell v. Sullivan*, 347 F. 2d 341, 345 (9<sup>th</sup> Cir.  
26 1991). In this case it is not the sole factor that the ALJ relied  
27 on; he also found that Plaintiff's failure to follow through with  
28 treatment recommendations cast doubt on her claims of disabling

1 pain and limitations. Noncompliance with medical care or  
 2 unexplained or inadequately explained reasons for failing to seek  
 3 medical treatment cast doubt on a claimant's subjective  
 4 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.  
 5 2d 597, 603 (9<sup>th</sup> Cir. 1989). In the undersigned's opinion, the  
 6 ALJ's reasons for finding Plaintiff less than fully credible are  
 7 clear and convincing.

8 When evaluating Dr. Kaltenbaugh's opinion, the ALJ considered  
 9 the medical expert's testimony as well. Dr. Weilepp pointed out  
 10 that when Dr. Kaltenbaugh opined that Plaintiff could not function  
 11 at her job, she was working part-time. (AR 243.)<sup>5</sup>

12 The ALJ rejected some of the limitations assessed by Dr.  
 13 Kaltenbaugh because (1) he appeared to base a great deal of his  
 14 opinion on Plaintiff's discredited subjective complaints; (2) his  
 15 opinion was inconsistent with the results of objective testing by  
 16 an examining physician, and (3) his opinion was inconsistent with  
 17 the opinion of the testifying medical expert. (AR 17-18). The ALJ  
 18 gave specific and legitimate reasons for rejecting Dr.  
 19 Kaltenbaugh's opinion.

20 Plaintiff similarly alleges that the ALJ failed to properly  
 21 credit the opinion of Donald Greggain, M.D., her "longtime  
 22 attending physician." (Ct. Rec. 10-2, pp. 6-8). The Commissioner  
 23 responds that the ALJ rejected Dr. Greggain's opinion because his  
 24 treatment was intermittent, progress notes from his office showed  
 25 that medication improved Plaintiff's depression, and Dr. Greggain  
 26 did not refer Plaintiff for mental health treatment. The

27  
 28 <sup>5</sup>The notes of Plaintiff's visit of November 26, 2002, with Dr.  
 Kaltenbaugh indicate that she recently quit all of her work. (AR 141).

1 Commissioner contends that these are specific and legitimate  
 2 reasons to reject the opinion. (Ct. Rec. 13, pp. 7-8).

3 On June 22, 2002, Plaintiff saw Beth Blankenship, PA-C, at  
 4 Dr. Greggain's office for pain in her right knee. (AR 168).  
 5 Plaintiff's orthopedist would not prescribe pain medication  
 6 because it was "a lifetime problem" and Vioxx had not worked. (AR  
 7 168). Plaintiff "has to work to make money to live, but [is] not  
 8 skilled in other jobs" so she "has to do what she can." (AR 168).  
 9 Ms. Blankenship suggested injections and prescribed naprosyn and  
 10 darvocet. (AR 168). Dr. Greggain reviewed the PA-C's plan and  
 11 approved it on June 24, 2002. (AR 168).

12 On July 30, 2002, Plaintiff's knee was doing better "when  
 13 laying off it" and after camping, walking and climbing she  
 14 experienced pain, tenderness and weakness. (AR 168). Ms.  
 15 Blankenship noted no obvious swelling, laxity or redness; after  
 16 discussing anxiety and keeping busy, she prescribed ativan. (AR  
 17 168).

18 At plaintiff's annual exam on November 26, 2002 (about 2  
 19 months after onset), Plaintiff asked Charlotte Ainge<sup>6</sup>, PA-C, for a  
 20 naprosyn refill, which she used for pain as needed. (AR 168).  
 21 Plaintiff noticed increased fatigue in the past few months and "is  
 22 going through changes at work and has felt more depressed lately."  
 23 (AR 168).<sup>7</sup>

24 More than 5 months later, on May 8, 2003, plaintiff returned

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26 <sup>6</sup>Ms. Ainge is also referred to as Tuck Ainge in the record. See e.g., AR  
 27 174.

28 <sup>7</sup>On this date, November 26, 2002, when Plaintiff reported "going through  
 changes at work" (AR 168), she also saw Dr. Kaltenbaugh and reported she  
 recently quit all of her work. (AR 141).

1 to Dr. Greggain's office for back pain, urinary frequency, and  
2 worsening depression. (AR 169). She had a lot of stress due to  
3 bankruptcy, and felt that she needed a little help. (AR 169). Ms.  
4 Ainge provided lexapro samples with directions to increase the  
5 dose after one week. (AR 170). Three weeks later (May 28, 2003),  
6 plaintiff felt her "depression is vastly improved on lexapro and  
7 is wanting to continue." (AR 171). On June 23, 2003, lexapro had  
8 helped but Plaintiff "feels she is slipping again"; Ms. Ainge  
9 doubled the dose from 20 to 40 milligrams. (AR 171). By August 7,  
10 2003, Plaintiff reported managing her moods much better and coping  
11 better with stress. (AR 172). On September 8, 2003, Ms. Ainge  
12 noted Plaintiff was walking with a friend 3 evenings a week and  
13 described some swelling in her feet and ankles. (AR 172). Her  
14 depression and anxiety had improved but Plaintiff felt "a little  
15 over medicated." (AR 172). Ms. Ainge noted that Plaintiff's mood  
16 was euthymic; her affect bright and conversant; she was well-  
17 groomed and well-dressed; her thoughts were organized and goal-  
18 directed, and her judgment and insight were good. (AR 173). Ms.  
19 Ainge reduced the lexapro dose. (AR 173).

20 More than 2 months later, on November 19, 2003, plaintiff  
21 complained of knee pain 1-2 nights a week, especially after  
22 walking a lot during the day. (AR 173). Ms. Ainge observed that  
23 Plaintiff's mood is euthymic, her affect appropriate, thoughts are  
24 organized and goal-directed, and she has good insight and  
25 judgment. (AR 173). Plaintiff's lexapro was continued at 20  
26 milligrams. (AR 174). By December 1, 2003, plaintiff was "doing  
27 better over all. Has noted she feels like doing more and getting  
28 around better on her knee with more regular naprosyn use." (AR

1 174). Her affect was bright and her thought content was less  
2 somatic. (AR 174). On December 22, 2003, plaintiff's fatigue and  
3 depression had increased; her home is "chaotic" and she may be  
4 losing her insurance. (AR 174).

5 Plaintiff returned to Dr. Greggain's office 4 months later,  
6 on April 23, 2004, with lots of low moods and financial stress;  
7 "life seems out of control"; and she wondered about increasing her  
8 20 milligram dose of lexapro. (AR 175). Ms. Ainge increased the  
9 dose back to 40 milligrams. (AR 176). On May 19, 2004, Plaintiff  
10 was sad and lethargic; she thought that lexapro might not be the  
11 right medication. (AR 176). Ms. Ainge told Plaintiff to taper  
12 the lexapro and begin wellbutrin. (AR 176). On May 24, 2004,  
13 Plaintiff was encouraged to seek another orthopedic evaluation of  
14 her knee. (AR 176). On May 28, 2004, Plaintiff's mood had  
15 improved but she had problems concentrating; Ms. Ainge noted  
16 Plaintiff indicated that she made an appointment for counseling  
17 for the following week. (AR 177.) On June 11, 2004, Plaintiff had  
18 a rash. She thought it was caused by the wellbutrin and had  
19 stopped taking it. (AR 177). Although Ms. Ainge suggested  
20 starting the wellbutrin again when the rash cleared (AR 177), when  
21 Plaintiff returned a month later she was taking it a couple of  
22 times a week and did not feel she could afford therapy. Her mood  
23 was dysphoric and affect hopeful. (AR 178). Ms. Ainge directed  
24 Plaintiff to take wellbutrin daily. (AR 178). When she returned 2  
25 months later, on September 16, 2004, Plaintiff had run out of  
26 medication 3 days earlier and "feels like she is falling apart."  
27 (AR 180). Ms. Ainge noted that Plaintiff's psychological  
28 symptoms are chronic depression, "relieved by medication." (AR

1 180). Ms. Ainge discussed with plaintiff the effects of abruptly  
2 stopping antidepressant medication, gave her celebrex for knee  
3 pain, and continued the dose of 300 milligrams of wellbutrin. (AR  
4 181-182). Plaintiff returned in 2 months later, on November 3,  
5 2004, and described being out of medication for a couple of days  
6 and feeling "awful." (AR 183). Ms. Ainge discussed the importance  
7 of maintaining medications for optimum treatment. (AR 184). On  
8 November 15, 2004, plaintiff's mood was "pleased" and anxious, not  
9 dysphoric. She was directed to continue taking her medications.  
10 (AR 189). On November 15, 2004, it was also reported that  
11 plaintiff "appeared to be in no acute distress." (AR 188). On  
12 November 23, 2004, plaintiff's "mood is much improved with the  
13 wellbutrin" but she continued to experience anxiety in the  
14 evening. (AR 191). Ms. Ainge added a prescription for an anti-  
15 anxiety medication, BuSpar. (AR 192).

16 The first record of Dr. Greggain's direct involvement with  
17 plaintiff is January 31, 2005, when he saw her for menopausal  
18 symptoms, depression and chronic knee pain. (AR 193). Plaintiff  
19 looked after her grandchildren at times but had no hobbies and  
20 felt helpless and hopeless. (AR 193). Dr. Greggain diagnosed  
21 depression NOS and opined that plaintiff's dosage of wellbutrin  
22 may need to be increased. (AR 194).

23 Dr. Greggain next saw plaintiff about 5 months later, on June  
24 14, 2005, for cough and cold symptoms. (AR 217). He diagnosed  
25 sinusitis and chronic major depression, and replaced wellbutrin  
26 with effexor. (AR 218). At this visit, Dr. Greggain referenced  
27 problems Plaintiff had with her right knee, but noted that  
28 "patient appeared to be in no acute distress." (AR 218). On

1 August 15, 2005, Dr. Greggain completed a Medical Assessment of  
2 Ability to Perform Work-Related Activities (Physical). (AR 219).  
3 He opined that Plaintiff could lift and carry less than 10  
4 pounds, walk 2 hours a day, assessed no sitting limitations, and  
5 opined that plaintiff's work-related activities are affected by  
6 "significant depression that is worsening with prolonged  
7 disability, refractory to medication." (AR 219-221).

8 The ALJ found that Dr. Greggain's opinion, that plaintiff had  
9 significant depression which was resistant to medication, was  
10 inconsistent with Dr. Greggain's progress notes and with those of  
11 his assistant, Charlotte Ainge, PA-C, from May of 2003 through  
12 June of 2005. (AR 16). The ALJ is correct. Extensive progress  
13 notes from Dr. Greggain's office, primarily by Ms. Ainge, indicate  
14 that when Plaintiff took prescribed antidepressant medication  
15 consistently, her mood improved; when she stopped or took it  
16 infrequently, her mood worsened. The ALJ noted that Dr.  
17 Greggain's treatment was intermittent, including a 5 month gap  
18 from January of 2005 to June of 2005. (AR 16). The ALJ pointed  
19 out that despite assessing "significant" depression, Dr. Greggain  
20 never conducted a mental status exam and did not refer Plaintiff  
21 for mental health treatment. (AR 16).

22 The ALJ is responsible for reviewing the evidence and  
23 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
24 *Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). If evidence supports  
25 more than one rational interpretation, the court must uphold the  
26 decision of the ALJ. *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir.  
27 1984). It is the role of the trier of fact, not this Court, to  
28 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. The

1 Court thus has a limited role in determining whether the ALJ's  
2 decision is supported by substantial evidence and may not  
3 substitute its own judgment for that of the ALJ even if it might  
4 justifiably have reached a different result upon de novo review.  
5 42 U.S.C. § 405(g).

6 Contrary to plaintiff's arguments, the ALJ properly  
7 considered the opinions of Drs. Kaltenbaugh and Greggain and gave  
8 a number of specific and legitimate reasons supported by medical  
9 evidence in the record for discounting those opinions. Since the  
10 ALJ's finding regarding plaintiff's limitations is consistent with  
11 the credible medical evidence of record, the undersigned finds  
12 that plaintiff's argument to the contrary is without merit.

13 The ALJ's determination that plaintiff retains the RFC to  
14 perform a wide range of sedentary work is consistent with and is  
15 supported by the detailed medical findings and opinions in the  
16 record.

17 **CONCLUSION**

18 Having reviewed the record and the ALJ's conclusions, this  
19 Court finds that the ALJ's decision that plaintiff is able to  
20 perform a wide range of unskilled sedentary work is supported by  
21 substantial evidence and free of legal error. Therefore,  
22 Plaintiff is not disabled within the meaning of the Social  
23 Security Act. Accordingly,

24 **IT IS ORDERED:**

25 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 10**) is  
26 **DENIED**.

27 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 12**) is  
28 **GRANTED**.

3. The District Court Executive is directed to enter judgment in favor of Defendant, file this Order, provide a copy to counsel for Plaintiff and Defendant, and **CLOSE** this file.

IT IS SO ORDERED.

**DATED** this 27th day of February, 2007.

s/Michael W. Leavitt  
MICHAEL W. LEAVITT  
UNITED STATES MAGISTRATE JUDGE